APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED MARCH 3, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5542

FRATERNAL ORDER OF POLICE
NEWARK LODGE NO. 12;
FARUQ ABDUL-AZIZ; SHAKOOR MUSTAFA

v.

CITY OF NEWARK; NEWARK POLICE DEPARTMENT;
JOSEPH J. SANTIAGO, NEWARK POLICE DIRECTOR;
THOMAS C. O'REILLY, NEWARK CHIEF OF POLICE,
Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 97-02672)
(District Judge: Honorable John W. Bissell)

Argued: June 25, 1998

Before: GREENBERG, ALITO, and McKEE,
Circuit Judges

(Opinion Filed: March 3, 1999)

Appendix A

* * *

OPINION OF THE COURT

ALITO, *Circuit Judge*:

This appeal presents the question whether the policy of the Newark (N.J.) Police Department regarding the wearing of beards by officers violates the Free Exercise Clause of the First Amendment. Under that policy, which the District Court held to be unconstitutional, exemptions are made for medical reasons (typically because of a skin condition called pseudo folliculitis barbae), but the Department refuses to make exemptions for officers whose religious beliefs prohibit them from shaving their beards. Because the Department makes exemptions from its policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons, we conclude that the Department's policy violates the First Amendment. Accordingly, we affirm the District Court's order permanently enjoining the Department from disciplining two Islamic officers who have refused to shave their beards for religious reasons.

I

Since 1971, male officers in the Newark Police Department have been subject to an internal order that requires them to shave their beards. In relevant part, the order provides:

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> Full beards, goatees or other growths of hair below the lower lip, on the chin, or lower jaw bone area are prohibited.

App. at 94 (Special Order from the Chief of Police No. 71-15, p.2 ("Order 71-15")). The order permits officers to wear mustaches and sideburns, *id.*, and it allows exemptions from the "no-beard" rule for undercover officers whose "assignments or duties permit a departure from the requirements." *Id.* at 93. *See* Appellees' Br. at 14; Reply Br. at 9.

Officers Faruq Abdul-Aziz and Shakoor Mustafa are both devout Sunni Muslims who assert that they believe that they are under a religious obligation to grow their beards. *See* App. at 9-10; Supp. App. 3-4. According to the affidavit of an imam, "it is an obligation for men who can grow a beard, to do so" and not to shave. Supp. App. at 3. The affidavit continues:

> . . . The Quran commands the wearing of a beard implicitly. The Sunnah is the detailed explanation of the general injunctions contained in the Quran. The Sunnah says in too many verses to recount [:] "Grow the beard, trim the mustache."
>
> . . . I teach as the Prophet Mohammed taught that the Sunnah must be followed as well as the Quran. This in the unequivocal teaching for the past 1,418 years, by the one billion living Sunni Muslims world wide.

> . . . The refusal by a Sunni Muslim male who can grow a beard, to wear one is a major sin. I teach based upon the way I was taught and it is understood in my faith that the non-wearing of a beard by the male who can, for any reason is as [serious] a sin as eating pork.
>
> . . . This is not a discretionary instruction; it is a commandment, A Sunni Muslim male will not be saved from this major sin because of an instruction of another, even an employer to shave his beard and the penalties will be meted out by Allah.

Supp. App. at 4. The defendants have not disputed the sincerity of the plaintiffs' beliefs.[1]

When Aziz and Mustafa were questioned about their noncompliance with Order 71-15, they informed Department officials that they were growing their beards for religious reasons. *See* Supp. App. at 1 & 5. This explanation was apparently deemed inadequate, and Mustafa received a Preliminary Notice of Disciplinary Action in July 1996 charging him with disobeying an oral command to comply with Order 71-15. App. at 96-97. Aziz received a similar notice in January 1997. *Id.* at 98-99. In both cases, the notices informed the officers that their actions might warrant "removal" from the Department. *Id.* at 96 & 98.

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1. *Cf. Lewis v. Scott*, 910 F.Supp. 282, 287 (E.D. Tex. 1995) (testimony of an Islamic chaplin regarding whether a beard is obligatory).

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On January 24, 1997, Chief of Police Thomas C. O'Reilly announced a "Zero Tolerance" policy for officers who were not in compliance with Order 71-15 and had not received "medical clearance" to wear a beard. App. at 95 (Memorandum from the Chief of Police No. 97-30 ("Memo 97-30")). Consistent with this policy, the Department ordered Officers Aziz and Mustafa to appear for disciplinary hearing in May 1997.

Prior to the hearing, Mustafa and Aziz filed a complaint in the District Court requesting permanent injunctive relief on the ground that the Department's enforcement of Order 71-15 would violate their rights under the Free Exercise Clause of the First Amendment.[2] After the defendants filed a motion to dismiss, and the plaintiffs filed a motion for summary judgment, the District Court held a hearing and concluded that the Department's application of Order 71-15 to Mustafa and Aziz would violate their free exercise rights. Accordingly, the District Court permanently enjoined the defendants "from disciplining or otherwise disadvantaging Plaintiffs Aziz and Mustafa for violating Order 71-15 or any other directive which would require them to shave or trim their beards in violation of their religious beliefs." App. at 23.

II

The Free Exercise Clause of the First Amendment, which has been made applicable to the States through the

2. Mustafa and Aziz brought several other claims, all of which were dismissed by the District Court. *See* App. at 15-16. The plaintiffs have not appealed these dismissals.

Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. For many years, the Supreme Court appeared to interpret the free exercise clause as requiring the government to make religious exemptions from neutral, generally applicable laws that have the incidental effect of substantially burdening religious conduct. *See Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) ("[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."); *see also Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 832-34 (1989); *Thomas v. Review Bd. of Indiana Employment Div.*, 450 U.S. 707, 717 (1981); *Sherbert v. Verner*, 374 U.S. 398, 403-404 (1963). In these cases, the Court required the government to meet "strict scrutiny" when application of a given law or regulation served to impose a substantial burden on religious activity. *See Thomas*, 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

In 1986, a plurality of the Court raised doubts about the breadth of the Court's "exemption" jurisprudence and proposed a new approach. *See Bowen v. Roy*, 476 U.S. 693, 703-08 (1986) (Burger, CA, joined by Rehnquist and Powell, J.J.). In *Roy*, a mother and father who wished to participate in the Aid

to Families with Dependent Children program objected on religious grounds to the requirement that they furnish their daughter's Social Security number as a condition of receiving benefits. *Id.* at 695. Although the Court's precedent indicated that these circumstances were sufficient to trigger strict scrutiny because the government had "condition[ed] receipt of an important benefit upon conduct proscribed by a religious faith," *Thomas*, 450 U.S. at 717-718, the plurality opinion applied rational basis review. *Roy*, 476 U.S. at 707-08. The opinion explained:

> We conclude . . . that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the dental of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action not governed by the same constitutional standard.

Id. at 706 (emphasis added). *See also id.* at 704.

In sum, the plurality proposed that the Court continue to apply heightened scrutiny to neutral, generally applicable laws that burden religious activity by affirmatively compelling or prohibiting conduct, but apply rational basis scrutiny to neutral, generally applicable rules governing

benefits programs. However, rather than advocating the overruling of the Court's prior benefits-exemption cases, such as *Sherbert* and *Thomas*, the plurality distinguished those decisions on the ground that they concerned laws that already included "mechanism[s] for individualized exemptions." *Roy*, 476 U.S. at 708. The plurality explained that if "a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent," and it is "appropriate to require the State to demonstrate a compelling reason for denying the requested exemption." *Id.* Since the statutory framework at issue in *Roy* did not provide for individualized exemptions, the plurality did not believe that the Court's prior benefits decisions were controlling.

The *Roy* plurality's attempt to distinguish the Court's previous decisions and apply rational basis review failed to garner a majority of the Court. *See id.* at 715-16 (Blackmun, J., concurring in part); *id.* at 728-32 (O'Connor, J., joined by Brennan and Marshall, J.J., concurring in part and dissenting in part); *id.* at 733 (White, J., dissenting). In 1990, however, the legal landscape changed dramatically when the Supreme Court handed down its decision in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *Smith* concerned two individuals who were denied state unemployment compensation benefits after being fired from their jobs for ingesting peyote, a controlled substance under Oregon law. *Id.* at 874. The individuals challenged the denial of benefits on the ground that they were entitled to religious exemptions since they had ingested peyote for sacramental purposes at a ceremony of the Native American Church. Declining to apply strict scrutiny, the

Court concluded that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (quotations omitted). *See also id.* at 878 (explaining that "if prohibiting the exercise of religion" is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended"). Accordingly, the Court held that Oregon could, consistent with the Free Exercise Clause, criminalize religious peyote use and deny unemployment compensation benefits to individuals whose job dismissals resulted from such use. *Id.* at 890.

The *Smith* Court, however, did not overrule its prior free exercise decisions, but rather distinguished them. *See Smith*, 494 U.S. at 881-884.[3] In this case, the plaintiffs contend that their Free Exercise claim is not governed by the generally applicable *Smith* rule but is instead governed by the Court's pre-*Smith* decisions. In this connection, the plaintiffs make three arguments. First, they contend that the *Smith* decision should be limited to cases involving criminal prohibitions. Second, they argue that the *Smith* analysis does not apply to government rules that, like the "no-beard" policy, already make secular exemptions for certain individuals. Finally, they maintain that the *Smith* rule does not bar their exemption claim because they are

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3. *See generally* Note, James M. Oleske, Jr., *Undue Burdens and the Free Exercise of Religion: Reworking a "Jurisprudence of Doubt"*, 85 Geo. L.J. 751 (1997).

relying on both the Free Exercise Clause and the Free Speech Clause. The District Court accepted the plaintiffs' first argument, applied the Court's pre-*Smith* jurisprudence, and concluded that the Free Exercise Clause prohibits the Department from enforcing its "no-beard" policy against Aziz and Mustafa. While we disagree with the District Court's conclusion that *Smith* is limited to the criminal context, we believe that the plaintiffs are entitled to a religious exemption since the Department already makes secular exemptions. As a result, we need not reach the plaintiffs' "hybrid" free speech/free exercise argument.[4] *See generally Smith*, 494 U.S. at 881-882 (distinguishing "hybrid" claims from free exercise claims).

III

A

Aziz and Mustafa first contend that the *Smith* rule applies only to cases involving criminal prohibitions. Since this case concerns a non-criminal prohibition, Aziz and Mustafa argue that the Court's pre-*Smith* decisions govern and heightened scrutiny applies. This position, however, has already been rejected by our court. *See Salvation Army v. Department of Community Affairs of New Jersey*, 919 F.2d 183, 194-96 (3d Cir. 1990). *Salvation Army* involved

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4. We do note, however, that the plaintiffs failed to allege a free speech violation in their complaint, *see* App. at 83-92, and explicitly disavowed such a claim before the District Court. *See* App. at 58 (July 18, 1997 Hearing) (counsel for plaintiffs) ("We can all agree that freedom of expression would not extend to the wearing of beards.").

a claim by The Salvation Army ("TSA") that it was entitled to a religious exemption from the requirements of the New Jersey Rooming and Boarding House Act of 1979, N.J. Stat. Ann. § 55:13B-1 (West 1989), and the regulations promulgated thereunder. *Salvation Army*, 919 F.2d. at 185. Like Aziz and Mustafa, TSA argued that "the Court's holding in *Smith* was limited to free exercise challenges to neutral, generally applicable *criminal statutes*." *Id.* at 194 (emphasis in original). Our response was unequivocal: "We cannot accept this interpretation of Smith." *Id.*

In addition to the analysis provided in *Salvation Army*, *see* 919 F.2d at 194-96, we believe there are two further reasons to conclude that *Smith* is not limited to cases involving criminal statutes. First, under a contrary reading of *Smith*, the Free Exercise Clause would not be implicated when the government prohibits religious conduct through generally applicable laws, *Smith*, 494 U.S. at 878-79, but would be implicated when the government imposes a lesser burden on religion through a generally applicable civil regulation. This counter-intuitive interpretation of the First Amendment is undermined by the very language of the *Smith* opinion:

> [I]f a state has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, *it certainly follows that it may impose the lesser burden* of denying unemployment compensation benefits to persons who engage in that conduct.

Smith, 494 U.S. at 875 (quotation omitted) (emphasis added). *See also id.* at 898-99 (opinion of O'Connor, J., joined by Brennan, Marshall, and Blackmun, J.J.) ("A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, more burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit.").

Second, the Supreme Court's most recent characterization of *Smith* supports our holding in *Salvation Army* that *Smith* is not limited to the criminal context. In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Supreme Court stated:

> *Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.

Id. at 2161. Nowhere in its discussion of *Smith* did the *Flores* Court indicate that the *Smith* decision only applied to generally applicable criminal laws. In fact, the law at issue in *Flores* was a non-criminal landmark ordinance. *See Flores*, 117 S. Ct. at 2160. If the plaintiffs are correct, and *Smith* does not apply to non-criminal provisions, there would have been no need for the *Flores* Court even to discuss *Smith*. However, the *Flores* Court did much more than to discuss *Smith*; it struck down the Religious Freedom Restoration Act of 1993, insofar as it applied to the states, for the very reason that it was inconsistent with *Smith*. *See Flores*, 117 S. Ct. at 2171-72. In light of *Flores*, it is difficult to say that *Smith* has no application to cases involving non-criminal statutes.

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Because this court has already rejected the argument that *Smith* is limited to cases involving criminal statutes, and because that rejection is amply supported by both the *Smith* opinion itself and recent Supreme Court case law, we cannot agree with the plaintiffs and the District Court that *Smith* is distinguishable on the ground that it concerned a criminal statute.

B

Aziz and Mustafa's second argument is that the Department's refusal to make religious exemptions from its no-beard policy should be reviewed under strict scrutiny because the Department makes secular exemptions to its policy. This contention rests on the following passage from *Smith* in which the Court explained why some of its earlier religious exemption cases had applied strict scrutiny:

> The statutory conditions in *Sherbert* and *Thomas* provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions. As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason.

Smith, 494 U.S. at 884 (quotations, citations, and alterations omitted).

The Court reiterated this understanding of its religious exemption jurisprudence, and applied it outside the unemployment compensation context, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993). In *Lukumi*, the Court reviewed several municipal ordinances regulating the slaughter of animals, one of which prescribed punishments for "[w]hoever . . . unnecessarily . . . kills any animal." *Id.* at 537. The Court explained that this ordinance could not be applied to punish the ritual slaughter of animals by members of the Santeria religion when the ordinance was not applied to secular killings:

> [B]ecause [the ordinance] requires an evaluation of the particular justification for the killing, this ordinance represents a system of individualized governmental assessment of the reasons for the relevant conduct. As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of "religious hardship" without compelling reason. Respondent's application of the test of necessity *devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus religious practice is being singled out for discriminatory treatment.*

Lukumi, 508 U.S. at 537-38 (emphasis added) (quotations and citations omitted).[5]

Aziz and Mustafa contend that, since the Department provides medical — but not religious — exemptions from its "no-beard" policy,[6] it has unconstitutionally devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons. The Department, on the other hand, maintains that its distinction between medical exemptions and religious exemptions does not represent an impermissible value judgment because medical exemptions are made only so as to comply with the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 (1994). *See* Brief in Support of the Defendants'

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5. *See also Roy*, 476 U.S. at 708 (plurality opinion):

> If a state creates a mechanism [for exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus . . . to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion.

6. In their reply brief, the defendants argue for the first time that the District Court "incorrectly decided the City of Newark has a medical exception." Reply Br. at 14. We will not entertain this argument as it conflicts with the defendants' position both in the District Court and in their opening brief to this court. *See* Defendants' Answer ¶ 3; Brief in Support of Defendants' Motion to Dismiss at 11; Appellants' Br. at 11. Moreover, we are at a loss to understand the defendants' new position given that Memo 97-30 clearly provides exemptions from the "Zero Tolerance" policy for those who "have received medical clearance." App. at 95.

Motion to Dismiss at 11. While this argument initially appears persuasive, it ultimately cannot be sustained.

It is true that the ADA requires employers to make "reasonable accommodations" for individuals with disabilities. 42 U.S.C. § 12111(b)(5)(A) (1994). However, Title VII of the Civil Rights Act of 1964 imposes an identical obligation on employers with respect to accommodating religion. 42 U.S.C. § 2000e(j) (1994). This parallel requirement undermines the Department's contention that it provides a medical exception, but not a religious exception, because it believes that "the law may require" a medical exception. Brief in Support of Defendants' Motion to Dismiss at 11. Furthermore, it is noteworthy that the Department has clearly been put on notice of Title VII's religious accommodation requirements. *See* EEOC Determination Letter, Charge No. 171970408 (attached to Plaintiffs' Letter Brief in Response to Defendants' Cross Motion for Summary Judgment); App. at 83 (Plaintiffs' Complaint) (citing Title VII). In light of these circumstances, we cannot accept the Department's position that its differential treatment of medical exemptions and religious exemptions is premised on a good-faith belief that the former may be required by law while the latter are not.

We also reject the argument that, because the medical exemption is not an "individualized exemption," the *Smith/Lukumi* rule does not apply. *See* App. at 19 (Dist. Ct. Op. at 12). While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi*, it is clear from those decisions that the Court's concern was the

prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection. *See generally Lukumi*, 508 U.S. at 542 (1992) ("All laws are selective to some extent, but *categories* of selection are of paramount concern when a law has the incidental effect of burdening religious practice.) (emphasis added). Therefore, we conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.

Contrary to the Department's contention, our decision to apply heightened scrutiny is entirely consistent with the result in *Smith*. In *Smith*, the Court upheld an Oregon law that prohibited the "knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner." *Smith*, 494 U.S. at 874. The Department argues that, since the prescription exception did not prompt the *Smith* Court to apply heightened scrutiny to the Oregon law, we should not apply heightened scrutiny in the instant case based on the Department's allowance of medical exemptions. *See* Appellants' Br. at 8-9. This argument, however, overlooks a critical difference between the prescription exception in the Oregon law and the medical exemption in this case.

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The Department's decision to allow officers to wear beards for medical reasons undoubtably undermines the Department's interest in fostering a uniform appearance through its "no-beard" policy. By contrast, the prescription exception to Oregon's drug law does not necessarily undermine Oregon's interest in curbing the unregulated use of dangerous drugs. Rather, the prescription exception is more akin to the Department's undercover exception, which does not undermine the Department's interest in uniformity because undercover officers "obviously are not held out to the public as law enforcement person[nel]." Reply Br. at 9. The prescription exception and the undercover exception do not trigger heightened scrutiny because the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing. However, the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.[7]

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7. While *Smith* and *Lukumi* speak in terms of strict scrutiny when discussing the requirements for making distinctions between religious and secular exemptions, *see Smith*, 494 U.S. at 884 requiring a "compelling reason"); *Lukumi*, 508 U.S. at 537 (same), we will assume that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department's actions cannot survive even that level of scrutiny.

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C

The Department has not offered any interest in defense of its policy that is able to withstand any form of heightened scrutiny. The Department contends that it wants to convey the image of a " 'monolithic, highly disciplined force' " and that "[u]niformity [of appearance] not only benefits the men and women that risk their lives on a daily basis, but offers the public a sense of security in having readily identifiable and trusted public servants." Appellant's Brief at 14 (citation omitted). We will address separately all of the interests that we can discern in this passage.

The Department hints that other officers and citizens might have difficulty identifying a bearded officer as a genuine Newark police officer and that this might undermine safety. But while safety is undoubtedly an interest of the greatest importance, the Department's partial no-beard policy is not tailored to serve that interest. Uniformed officers, whether bearded or clean-shaven, should be readily identifiable. Officers who wear plain clothes are not supposed to stand out to the same degree as uniformed officers, and in any event the Department permits such officers to wear beards for medical reasons. The Department does not contend that these medical exemptions pose a serious threat to the safety of the members of the force or to the general public, and there is no apparent reason why permitting officers to wear beards for religious reasons should create any greater difficulties in this regard.

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The Department also suggests that permitting officers to wear beards for religious reasons would undermine the force's morale and esprit de corps. However, the Department has provided no legitimate explanation as to why the presence of officers who wear beards for medical reasons does not have this effect but the presence of officers who wear beards for religious reasons would. And the same is true with respect to the Department's suggestion that the presence of officers who wear beards for religious reasons would undermine public confidence in the force. We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not. Conceivably, the Department may think that permitting officers to wear beards for religious reasons would present a greater threat to the sense of uniformity that it wishes to foster because the difference that this practice highlights — namely, a difference in religious belief and practice — is not superficial (like the presence of pseudo folliculitis barbae) and thus may cause divisions in the ranks and among the public. (There is no doubt that religious differences have been a cause of dissension throughout much of human history.) But if this is the Department's thinking — and we emphasize that the Department has not spelled out this argument in so many words — what it means is that Sunni Muslim officers who share the plaintiffs' religious beliefs are prohibited from wearing beards precisely for the purpose of obscuring the fact that they hold those beliefs and that they differ in this respect from most of the other members of the force. In other words, if this is the real reason for the distinction that is drawn between medical and religious exemptions, we have before us a policy the very purpose of which is to suppress manifestations of the religious diversity

that the First Amendment safeguards. Before sanctioning such a policy, we would require a far more substantial showing than the Department has made in this case. We thus conclude that the Department's policy cannot survive any degree of heightened scrutiny and thus cannot be sustained.[8]

IV

For the reasons set out above, we affirm the decision of the District Court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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8. We also reject the defendants' argument that the District Court erred in awarding some $12,000 in attorney's fees in favor of the plaintiffs. The defendants argue that this amount was unnecessary because the plaintiffs might have prevailed without federal court litigation had they pursued available administrative remedies. We conclude, however, that the District Court acted well within the proper bounds of its discretion in making the award that it did under the circumstances present here.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 3, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5542

FRATERNAL ORDER OF POLICE NEWARK LODGE NO. 12; FARUQ ABDUL-AZIZ; SHAKOOR MUSTAFA

v.

CITY OF NEWARK; NEWARK POLICE DEPARTMENT; JOSEPH J. SANTIAGO, NEWARK POLICE DIRECTOR; THOMAS C. O'REILLY, NEWARK CHIEF OF POLICE,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 97-02672)
(District Judge: Honorable John W. Bissell)

Present: Greenberg, Alito, and McKee, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on June 25, 1998.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 31, 1997, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: March 3, 1999

Cost Taxed In Favor of Appellees' as follows:

Total for Brief	$59.20
Total for Supplemental Appendix	$32.28
Total for Sales Tax	$ 5.49
Total	$96.97

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY WITH EXHIBITS DATED JULY 29, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 97-2672

FRATERNAL ORDER OF POLICE, NEWARK LODGE NO. 12, FARUQ ABDUL-AZIZ AND SHAKOOR MUSTAFA

Plaintiffs,

v.

CITY OF NEWARK, NEWARK POLICE DEPARTMENT, NEWARK POLICE DIRECTOR JOSEPH J. SANTIAGO, AND NEWARK CHIEF OF POLICE THOMAS C. O'REILLY

Defendants.

* * *

OPINION

BISSELL, *District Judge*

This matter comes before the Court on Plaintiffs, motion for summary judgment and Defendants' cross motion to dismiss. This action stems from the efforts of the Newark Police Department to enforce certain grooming restrictions

which prohibit police officers from growing beards. Plaintiffs allege that this restriction, as applied, violates the Free Exercise Clause of the First Amendment of the United States Constitution, Title VII (42 U.S.C. § 2000e), 42 U.S.C. § 1983, 42 U.S.C. § 1981, the Religious Freedom Restoration Act ("RFRA") and the New Jersey Law Against Discrimination ("NJLAD").

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

Facts

Plaintiffs Faruq Abdul 'Aziz and Shakoor Mustafa are members of the Newark Police Department. They are also devout observers of the Islamic faith. (Compl. at ¶ III). Specifically, they are "Sunni Muslims" who follow the teachings of both the Holy Quran and the Sunnah. (Adib Aff. at ¶ 9). The Sunnah requires that a man who can grow a beard must do so, and trim his mustache[1]. (*Id.* at ¶¶ 8, 9).

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1. In several passages, the Sunnah expresses:

> Do the opposite of what the Pagans do, cut the mustaches short and leave the beard (as it is) . . . .
>
> Be different from the Mushrikeen, trim your mustache and grow your beards . . . .
>
> Clip your mustaches and grow your beard — differ from the Magians . . . .

(Cont'd)

Appendix C

The refusal by a Sunni Muslim male who can grow a beard to wear one is a major sin and is tantamount to eating pork. (*Id.* at ¶ 11). The Sunnah allows no discretion in this matter. (*Id.* at ¶ 12).

Plaintiff 'Aziz has been employed by the Newark Police Department since 1989. (Compl. at ¶ VI). Plaintiff Mustafa has been employed by the Defendants since at least 1986. (Compl. at ¶ XI). Mustafa has worn a beard since 1986. (*Id.*). 'Aziz has worn a beard since his graduation from the police academy. (Compl. at ¶ IX).

On March 23, 1971, then Chief of Police Anthony Barres issued Order from the Chief of Police No. 71-15 ("Order 71-15") (Attached hereto as Exhibit A). Order 71-15 provides for the regulation of hair style and facial hair growth of police officers. Relevantly, it provides:

> Full beards, goatees or other growths of hair below the lower lip, on the chin, or lower jaw bone are prohibited.

Id. Mustaches and sideburns are allowed within certain limitations. *Id.*

(Cont'd)

> Shorten your moustaches and let your beards grow, be different from the people of the book. . . .
>
> Ten things are from the Fitrah: Shortening the moustache and growing the beard. . . .

(Compl. at ¶ VIII).

Appendix C

On January 24, 1997, Defendant Chief of Police Thomas C. O'Reilly issued Memorandum 97-30. (Attached hereto as Exhibit B). It instructed all Bureau Commanders to submit lists of those officers who were not in compliance with the grooming standards. It stated that "Personnel who have received medical clearance shall be documented and updated to ensure that medical clearance is current." (*Id.*). For all others there was "[a] '*ZERO-TOLERANCE*' policy" for noncompliance. (*Id.*).

Plaintiff 'Aziz has been charged with disobeying order 71-15, and has been served with a Preliminary Notice of Disciplinary Action. (Compl. at Exh. C). The notice states that "The following disciplinary action may be taken against ['Aziz]: Removal." (*Id.*). Plaintiff Mustafa has been charged with disobeying the verbal order of Lt. Alfred Pepe to shave, and has also been served with a Preliminary Notice of Disciplinary Action. (Compl. at Exh. D). Mustafa's notice also indicates removal as the potential sanction. (*Id.*).

The hearings have not taken place at this time, partially due to the filing of this Complaint and other filings before the Equal Employment Opportunity Commission. However, Defendants fully intend to prosecute these alleged violations. (*See* Defendants' Brief at 1-2).

Analysis

I. Parties

Plaintiffs purport to bring this action on behalf of themselves and all others similarly situated. The Complaint

defines the relevant class as "All Newark Police Officers of the Islamic faith who will be denied employment because of the discriminatory practices of defendants as described herein." (Compl. at ¶ XVII). They seek certification of this class under Federal Rule of Civil Procedure 23(a) and 23(b)(2). These Rules provide:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .

Fed. R. Civ. P. 23.

The Court finds that the requirements of Rule 23 have not been met, particularly, the numerosity requirement. As was made clear at oral argument, the individuals who have religious conflicts with adherence to Order 71-15 are readily identifiable and their joinder would not be impracticable.

Similarly, the Court also dismisses the Complaint as to the Fraternal Order of Police. While that entity might have standing in some circumstances, it does not in this case. *See, e.g. Lujan v. National Wildlife Federation*, 497 U.S. 871 (1988). The rights which are sought to be asserted belong to the individual officers, and the F.O.P. represents a much broader and more diverse group than those whose rights are at issue here. Furthermore, its status as a union could confine its actions as a party to those available under the National Labor Relations Act.

II. Standards

A. Motion to Dismiss

Fed. R. Civ. P. 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989), citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 45-46 (1957). In disposing of a motion to dismiss, the court operates on the assumption that the factual allegations in the complaint or counterclaim are true. *Neitzke*, 490 U.S. at 326-27. A motion to dismiss may be granted if the opposing party would not be entitled to relief under any set of facts consistent with the allegations in the complaint or counterclaim. As the Supreme Court stated in *Neitzke*:

> [n]othing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," *Hishon, supra* at 73, 104 S.Ct. 2229, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations.

Id. at 327.

B. Motion for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c); *see also Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987). In deciding a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party and must resolve any reasonable doubt as to the existence of a genuine issue of fact against the moving party. *Continental Insurance Co. v. Bodie*, 682 F. 2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no

genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Supreme Court has stated that, in applying the criteria for granting summary judgment,

> the judge must ask . . . not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *Id.*

In order to survive a motion for summary judgment, a plaintiff must present "more than a mere scintilla of evidence" in his favor. He "cannot simply reallege factually unsupported allegations contained in his pleadings." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 325 (1986);

see also Maguire v. Hughes Aircraft Corp., 912 F.2d 67, 72 (3d Cir. 1990). Only evidence that would be admissible at trial may be used to test a summary judgment motion. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). Evidence with a deficient foundation must be excluded from consideration. *Williams v. Borough of West Chester, PA*, 891 F.2d 458, 466 (3d Cir. 1989); *see also Trap Rock Indus., Inc. v. Local 825, Int'l Union of Operating Eng'rs*, 982 F.2d 884, 890-91 (3d Cir. 1992).

III. Free Exercise Clause

Plaintiffs allege that the Defendants' actions are violative of the Free Exercise Clause of the First Amendment of the U.S. Constitution[2].

> The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const., Amdt. 1 (emphasis added.) The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First

2. More specifically, that § 1983 has been violated by the state action which infringes the Plaintiffs' First Amendment rights.

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Amendment obviously excludes all "governmental regulation of religious beliefs as such." *Sherbert v. Verner*, supra, 374 U.S., at 402, 83 S.Ct., at 1793. The government may not compel affirmation of religious belief, *see Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard*, 322 U.S. 78, 86-88, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944), impose special disabilities on the basis of religious views or religious status, *see McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953); *cf. Larson v. Valente*, 456 U.S. 228, 245, 102 S.Ct. 1673, 1683-84, 72 L.Ed.2d 33 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, *see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445 452, 89 S.Ct. 601, 604-608, 21 L.Ed.2d 658 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119, 73 S.Ct. 143, 143-56, 97 L.Ed. 120 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-725, 96 S.Ct. 2372, 2380-2388, 49 L.Ed.2d 151

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 876-77 (1990).

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The Court must first determine what standard of review is to be applied to the Defendants' actions and policies[3].

The Supreme Court confronted a somewhat similar situation in *Goldman v. Weinberger*, 475 U.S. 503 (1986). The plaintiff in *Goldman* was a clinical psychologist enlisted in the United States Air Force, who was also an Orthodox Jew and ordained rabbi. *Goldman*, 475 U.S. at 504. Goldman wore a yarmulke while in uniform, which violated an Air Force regulation prohibiting the wearing of headgear indoors. *Id.* at 505. Goldman challenged the regulation as violative of the Free Exercise Clause.

In upholding the regulation, the Supreme Court relied predominantly on the special status of the military.

> 'the military is, by necessity, a specialized society separate from civilian society.' '[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life,' in order to prepare for and perform its vital role. Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The

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3. Plaintiffs initially argued that this case was governed by the standard of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb et seq. However, the Supreme Court has invalidated that statute with its recent decision in *City of Boerne v. Flores*, 1997 WL 345322 (June 25, 1997). Therefore, RFRA no longer has any bearing on this Court's analysis, and any claim based upon that statute is dismissed.

> military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."

Id. at 506 (citations omitted). Therefore, the Court declined to apply either the test of *Sherbert v. Verner*,[4] 374 U.S. 398, 403 (1963), or *Wisconsin v. Yoder*,[5] 406 U.S. 205 (1972).

In *Smith*, the Supreme Court was confronted with the application of Oregon's drug laws to the sacramental use of peyote[6]. *Smith* 494 U.S. at 874. The Court again declined

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4. The *Sherbert* test is "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right." *Sherbert*, 374 U.S. at 406.

5. *Yoder* requires a showing that "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Yoder*, 406 U.S. at 214.

6. While Smith involved the denial of unemployment benefits, they were denied as a result of "misconduct" which included illegal activities. Therefore, the question before the Court was not strictly the denial of unemployment benefits on the basis of religious practices (*see, e.g. Sherbert*, supra), but "whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug. . . ." *Smith* 494 U.S. at 874.

to apply the compelling state interest standard of *Sherbert*. *Id.* at 882-89. Instead the Court held that "if prohibiting the exercise of religion . . . is not the object of the [statute,] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. at 878.

Both *Goldman* and *Smith*, however, must be read in the context of the facts which they presented. The military regulation in *Goldman* was afforded deference that a civilian rule, such as that presented here, would not be. *Goldman*, 475 U.S. at 506, ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"). In *Smith*, the Court found it "*critical*" that "the conduct at issue . . . was . . . prohibited by *law*." *Smith*, 494 U.S. at 876 (emphasis added). In the present case, we are not confronted with either a military or legislative determination which must be afforded similar deference. Order 71-15 is merely a management directive of an employer, and carries no greater significance because that employer is a police department.

However, *Smith* does appear to mark a departure from the compelling interest standard of *Sherbert* outside the unemployment compensation context. *Smith*, 494 U.S. at 883-84. Although there is an exemption for medical reasons[7]

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7. Several officers suffer from pseudofolliculitis barbae "PFB"). "This condition is caused by sharp tips of recently shaved facial hairs penetrating the skin and causing an inflammatory reaction. The disease occurs in persons with curly or kinky hair

(Cont'd)

to Order 71-15, it is a categorical exemption rather than the "individual exemptions" which characterized *Sherbert* and its progeny. *Smith*, 494 U.S. at 884; *Cf. E.E.O.C. v. United Parcel Service*, 1993 WL 487356, *2 (N.D. Ill. Nov. 22, 1993) (PFB exemption not facially discriminatory).

The more appropriate test in evaluating an internal regulation such as Order 71-15, is the balancing test of *Yoder*, whether the governmental interest is "of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Yoder*, 406 U.S. at 214; *accord Marshall v. District of Columbia*, 392 F. Supp. 1012, 1013 (D.D.C. 1975), *aff'd* 559 F.2d 726 (D.C. Cir. 1977) (*Yoder* is the appropriate test in evaluating a police officer's religious challenge to a grooming regulation).

Marshall dealt with a nearly identical situation, and should therefore be discussed in this Court's analysis. The plaintiff in *Marshall* was a police officer in the District of

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(Cont'd)
follicles. After shaving, the curved hair follicles cause the already curly hair to curve back into contact with the skin surface, pierce and reenter the skin, causing a pseudofollicle.

The inflammatory reaction may result in papules, pustules or abscesses. An individual with PFB may induce remission by growing a beard. Remission in such cases is nearly total and complete. An individual can, however, redevelop the disease by resuming shaving . . . PFB, is a skin disorder that overwhelmingly affects black men who shave." *Equal Employment Opportunity Commission v. Greyhound Lines, Inc.*, 494 F. Supp. 481, 483 (E.D. Pa. 1979), *rev'd on other grounds* 635 F.2d 188 (1980).

Columbia Police Department who was disciplined for violating the department's grooming regulations when he refused to shave his beard or cut his hair for religious reasons[8]. While it enunciated the same test which this Court has adopted, the *Marshall* court turned it on its end. The inquiry ultimately became "whether the defendants should be compelled to accommodate plaintiff's religious conviction." 392 F. Supp. at 1015. Although the court made no effort to define Marshall's interests, it accepted without reservation the police department's contention that any deviation from the regulation would "wholly undermine[ ]" its purpose. *Id.* at 1016. This Court disagrees with that limited analysis.

Furthermore, by providing a medical exemption, Defendants own actions belie any similar argument that Order 71-15 must remain inviolate for the police department to function. Plaintiffs have presented evidence that shows the strength of their interest in being able to grow beards. Order 71-15 "sets up an . . . absolute bar to the fulfillment of a religious duty." *Goldman v. Weinberger*, 475 U.S. 503, 514 (1986) (Brennan, J. dissenting).

In support of their position, the Defendants present a tautological argument, that uniformity is necessary to fulfill "the City's compelling need for uniformity." (Defendants' Brief at 8). However, uniformity is the *means* which they have chosen to create a disciplined and effective police force, it is not a state interest standing alone. The litany of

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8. The court makes no reference as to what those "religious reasons" were.

potential terrors which the Defendants describe: loss of public confidence; having to determine each officer's religion; officers using drugs; and rebellion, are not a foreseeable and proximate result of allowing some officers to wear beards. Instead, uniformity must be viewed as an effective mechanism to express identity, instill public confidence, and create esprit de corps. Defendants have offered no support for their prognostications that unless the zero-tolerance position is adhered to, these objectives cannot be reached[9]. To the contrary, the presence of visibly devout Muslim officers could actually aid the department in demonstrating to the public "that a police officer represents justice, fairness and help to *all*," including Muslim members of the community. (Defendants' Brief at 7).

Defendants' present willingness to provide medical exemptions also undermines their zero-tolerance stance towards religious exemptions.

> In light of the high value accorded First Amendment rights in our system of law, defendants' willingness to agree to the

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9. While the Court recognizes that Defendants' motion is a motion to dismiss, their brief contains unsupported factual assertions in this regard. *Accord Sharif v. City of Chicago*, 530 F. Supp. 667, 670 (N.D. Ill. 1982) ("At this Court's hearing and during oral argument, counsel for the defendants stated (although no proof was introduced) that the Department's ban on beards is based on its interests in uniformity of appearance, esprit de corps and discipline. This Court will not take judicial notice of those reasons, as courts often effectively do in determining whether there is a rational basis for legislation. . . ."

> non-enforcement of the prohibition of beards against a large number of police officers for medical reasons precludes defendants from asserting that they have a compelling governmental interest in banning Sharif's growth of a minimal beard for bona fide religious reasons. All the asserted interests referred to in this paragraph are impaired just as much (or just as little) by permitting a beard for one reason as for another.

Sharif v. City of Chicago, 530 F. Supp. 667, 670 (N.D. Ill. 1982).

Defendants have not shown the existence of a state interest which is sufficient to override that of the Plaintiffs' to practice their religion. Order 71-15, insofar as it requires these Muslim officers to shave, is unconstitutional and a violation of § 1983.

IV. Other Claims

To the extent that plaintiffs have stated a claim under Title VII, 42 U.S.C. § 2000e, or under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*, those claims are dismissed without prejudice. The individual plaintiffs have yet to exhaust the administrative remedies available under those statutes.

Also dismissed without prejudice, are any claims which may exist as to the treatment of officers with pseudofolliculitis barbae. Those claims do not implicate the Free Exercise Clause under § 1983.

Appendix C

V. Relief

Plaintiffs have not sought compensatory damages, and, therefore, they will not be awarded. Permanent injunctive relief has been requested and is appropriate. The Defendants, and any person acting in concert with them, shall be enjoined from disciplining or otherwise disadvantaging Plaintiffs 'Aziz and Mustafa for violating Order 71-15 or any other directive which would require them to shave or trim their beards in violation of their religious beliefs. The Court declines to maintain continuing jurisdiction over this action beyond that required by law.

Plaintiffs have also sought costs, disbursements, and attorney's fees. The judgment in favor of the Plaintiffs will be entered with taxable costs which they may pursue under Local Civil Rule 54.1. Any application for disbursements and or attorney's fees (complying with Local Civil Rule 54.2) must be made by way of motion on notice filed under Local Civil Rule 7.1(c) by August 28, 1997. No alternative relief is deemed necessary or appropriate.

Conclusion

For the foregoing reasons Defendants' motion to dismiss is granted in part and denied in part. The motion of the individual Plaintiffs, Abdul 'Aziz and Mustafa, for summary judgment is granted as to their claims based upon the First Amendment and 42 U.S.C. § 1983. Plaintiffs, counsel is requested to prepare and submit an Order, pursuant to Local Civil Rule 58.1(b), reflecting the decisions expressed in this Opinion.

Appendix C

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: July, 29 1997.

Appendix C

EXHIBIT A

POLICE DEPARTMENT
NEWARK, NEW JERSEY

PUB 3-1

March 23, 1971

SPECIAL ORDER FROM THE CHIEF OF POLICE
NO. 71-15

TO: ALL COMMANDS

FROM: CHIEF OF POLICE

SUBJECT: STANDARDS OF APPEARANCE —
HAIR STYLE — FACIAL HAIR GROWTHS

PURPOSE

The purpose of this order is to set standards of appearance for hair styles and facial hair growths worn by Police officers. The tolerances set forth represent a reconciliation between the current acceptance of fuller and longer male hair styling and the need for establishing clearly defined limits within which our Department can maintain its uniformed identity.

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REQUIREMENT

The standards as defined are a compilation of recommendations made by Divisional Commanders after consultation with subordinates at all functional levels. The tenets of this order are binding on all Police Officers except when their assignments or duties permit a departure from the requirements. However, any departure must be approved by the Divisional Commander.

STANDARDS

Effective this dated, all male Police Officers shall regulate their hair style and facial hair growths to conform with the standards for on duty appearance as listed in this section.

a. *Hair*

(1) The style shall be of medium length and fullness.

(2) The duck tail length is prohibited.

(3) Bushy hair protruding from the sides or back of the head, when a hat is worn, is prohibited.

(4) A neat pattern on the rear of the neck shall be maintained. The growth must be neatly trimmed near the collar line and shall not extend over a shirt or coat collar.

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b. *Sideburns*

(1) The length shall not extend beyond the tip of the ear lobe.

(2) The width shall not extend 1¼-inch at the broadest point.

(3) The growth shall not be more than ¼-inch in depth.

c. *Mustache*

(1) The pattern shall be neatly trimmed.

(2) The extent of growth shall be limited to ½-inch below the line of the corner of the mouth.

(3) The thickness shall be ½-inch in depth and not appear bushy.

(4) The ends may not be waxed or twisted.

d. *Full Beards - Goatees*

Full beards, goatees or other growths of hair below the lower lip, on the chin, or lower jaw bone area are prohibited.

e. *Clean Shaven*

Except for the areas of facial growth permitted by this order, all members shall be clean shaven.

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RULES AND REGULATIONS

This order supplements the Rules and Regulations concerned with members' personal appearance. Any conflict shall be resolved in favor of the standards set by this order.

s/ Anthony Barres
ANTHONY BARRES
CHIEF OF POLICE

Appendix C

EXHIBIT B

MEMORANDUM FROM THE CHIEF OF POLICE
NEWARK POLICE DEPARTMENT

MEMO NO: 97-30 FILE RE: SWN 25

ALL COMMANDS DATE: JANUARY 24, 1997

FROM: THOMAS C. O'REILLY, CHIEF OF POLICE

SUBJECT: GROOMING — APPEARANCE
COMPLIANCE WITH DEPARTMENT
POLICY — RULES & REGULATIONS

1) Bureau Commanders are to submit a list of personnel who are in non-compliance with grooming standards set by the department.

2) Personnel who have received medical clearance shall be documented and updated to ensure that medical clearance is current.

3) A *"ZERO-TOLERANCE"* policy will be adhered to for those in non-compliance.

4) All department supervisors are reminded as to their roles and responsibilities in ensuring that all rules and regulations concerning dress and grooming are adhered to. Violations of these rules and regulations shall be dealt with accordingly. In all cases of violations, written documentation must be maintained in order to provide progressive discipline.

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5) Inspectional Services will be monitoring compliance.

6) This order shall take effect immediately.

7) A signed copy of this directive indicating receipt and acknowledgement shall be returned to this office on or before Monday, February 3, 1997.

s/ Thomas C. O'Reilly
THOMAS C. O'REILLY
Chief of Police

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AUGUST 20, 1997, FILED AUGUST 22, 1997 AND ENTERED AUGUST 26, 1997

RONALD WM. SPEVACK, ESQ.
525 Green Street
Iselin, New Jersey 08830
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LL204330

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No: 97-2672

FRATERNAL ORDER OF POLICE, NEWARK LODGE NO. 12, FARUQ ABDUL-AZIZ, AND SHAKOOR MUSTAFA,

Plaintiffs,

vs.

CITY OF NEWARK, NEWARK POLICE DEPARTMENT, NEWARK POLICE DIRECTOR JOSEPH J. SANTIAGO, AND NEWARK CHIEF OF POLICE THOMAS C. O'REILLY,

Defendants.

ORDER

Appendix D

THIS MATTER being brought to the Court by Plaintiffs' counsel, Robert R. Cannan, Esq. by motion for Summary Judgment, and Defendants' counsel by Darryl M. Saunders, Esq. by cross motion to dismiss, and oral arguments having been heard on July 28, 1997, and it appearing therefrom the following:

Plaintiffs Aziz and Mustafa are police officers of the defendant City of Newark. They are both Muslims who wear beards in the practice of their religion. Defendants have sought to require plaintiffs to shave their beards or alternatively face discipline pursuant to Order 71-15 which sets forth a grooming standard. Order 71-15, insofar as it requires these Muslim officers to shave, is unconstitutional and a violation of the First Amendment and 42 U.S.C. § 1983.

It is on this ___ day of August, 1997, Ordered as follows:

1. The defendants, and any person acting in concert with them, shall be enjoined from disciplining or otherwise disadvantaging Plaintiffs Aziz and Mustafa for violating Order 71-15 or any other directive which would require them to shave or trim their beards in violation of their religious beliefs.

2. Plaintiffs' request to be certified as a class under Federal Rule of Civil Procedure 23(a) and 23(b)(2) is hereby denied.

3. Plaintiffs' Complaint as to the Fraternal Order of Police, Newark Lodge No. 12 is hereby dismissed.

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4. Any claims brought by Plaintiff under the Religious Freedom Restoration Act of 1993 are dismissed.

5. Plaintiffs' claim under Title VII or under the New Jersey Law Against Discrimination, are dismissed without prejudice.

6. Any and all claims which may exist as to the treatment of officers with pseudo folliculitis barbae, are dismissed without prejudice.

7. The Court declines to maintain continuing jurisdiction over this action beyond that required by law.

8. Judgment in favor of the Plaintiffs will be enforced with taxable costs which they may pursue under Local Civil Rule 54.1.

9. Any application for disbursements and or attorney's fees must be made by way of motion on notice filed under Local Civil Rule 7.1(c) by August 28, 1997.

10. No alternative relief is deemed necessary or appropriate.

11. A copy of this Order be served upon the defendants through the Corporation Counsel of the City of Newark within 5 days of the date hereof.

s/ John W. Bissel
JOHN W. BISSEL
United States District Judge

Dated: August 20, 1997